

HIGH COURT OF UTTARANCHAL AT NAINITAL

Civil Arbitration Application No. 19 of 2004

M/s Prem Sukh Construction Company
R/o 2G-39, Vidhi Vihar
New Tehri, Tehri Garhwal
Uttaranchal Applicant

Versus

1. The Chairman & Managing Director
THDC Limited A-10 Sector-I
Kribhco Bhawan 4th Floor
Noida – 201301
2. The Deputy General Manager (UR)
THDC New Tehri
New Tehri, Uttaranchal Respondents

Hon'ble J.C.S. Rawat, J.

Heard Sri S.K. Jain learned counsel for the applicant and Sri U.K. Uniyal learned senior counsel for the respondents assisted by Sri Shobit Saharia learned Advocate.

The petition under section 11(5)(6) of the Arbitration & Conciliation Act 1996 has been preferred with the prayer to appoint an arbitrator for the settlement of the disputes between the parties or designate any person or institution for such appointment as per section 11 of the Arbitration & Conciliation Act.

The learned counsel for the applicant contended that he will file the claim before the Arbitrator.

There is a clause in the Arbitration & Conciliation Agreement to appoint an Arbitrator for the settlement of the disputes between the parties.

A letter was sent to the opposite parties by the applicant with the request either to resolve the dispute amicably or to appoint an Arbitrator according to the terms and conditions so that the Arbitrator may resolve the dispute between the parties. When the

opposite parties neither settled the dispute nor appointed any Arbitrator according to the general conditions of the contract. Thereafter, the applicant sent a notice dated 25.9.2004 to the opposite parties and the said notice was served on 5.10.2004. In the said notice, the applicant requested them either to pay the amount claimed by him or to settle the dispute or to appoint an Arbitrator for settlement of the dispute between the parties.

But, the opposite parties neither paid the payment claimed by the applicant nor settled the dispute nor appointed any Arbitrator.

Therefore, this petition under section 11(5)(6) of the Arbitration & Conciliation Act has been filed before this Court. In exercising of the power conferred under section 11 of the Arbitration & Conciliation Act, Mr. Justice Lakshmi Bihari, former Judge of the Allahabad High Court, Flat No. 12, Indira Puram Phase 3, Milan Vihar, General Mahadeo Singh road, Dehradun is appointed as an Arbitrator, who will submit its award within a period of six months.

The petition is disposed of accordingly.

(J.C.S. Rawat, J.)

Dated 11.5.2005

LSR

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL
Time Extension Application No. 2000 of 2006 &
Objection against Time Extension Application No. 3821 of 2006
IN
Civil Arbitration Application No. 19 of 2004
In the matter of Arbitration between

M/s Prem Sukh Construction Company,
R/O 2G-39, Vidhi Vihar, New Tehri,
Tehri Garhwal, Uttaranchal.

..... **Applicant.**

Versus

1. The Chairman & Managing Director.
TH.D.C. Limited, A-10 Sector-I, Kribhco Bhawan, 4th
Floor
Noida- 201 301.
2. The Deputy General Manager (UR)
T.H.D.C., New Tehri, Uttaranchal.

.... **Respondents.**

Sri S.K. Jain, Adv. Learned counsel for the applicants.

Sri Sachin Datta & Sri Manoj Tiwari, Adv., learned counsel for the respondents.

Dated July 21, 2006.

Hon'ble B.S. Verma, J.

Heard Sri S.K. Jain learned counsel for the applicant as well as Sri Sachin Datta, learned counsel for the opposite-party (respondents).

Relevant facts of the case are that the petitioner moved an application under Section 11 of the Arbitration and Conciliation Act 1996, for appointment of an arbitrator for settlement of disputes between the parties, which was registered as Civil Arbitration Application No. 19 of 2004, which was allowed vide order dated 11.5.2005 and Justice Lakshmi Bihari, former Judge of Allahabad High Court was appointed the sole Arbitrator and he was required to submit its award within a period of six months. However, since the period of six months already before conclusion of the proceedings before the Arbitrator on 11.11.2005, the applicant moved Time Extension Application No. 2000 of 2006 on 27-2-2006 with a prayer that the some more time be allowed to the Arbitrator to conclude the proceedings and give the award.

The application was opposed by the respondent by Application No. 3821 of 2006 on 29-3-2006 stating therein that vide order dated 25.5.2005, by an administrative order of the Court Arbitrator was appointed. According to them, the claims referred to the Arbitrator being not maintainable and the reference to Arbitrator being not in accordance with law, the respondents filed an application under Section 16 of the said Act. Before deciding the objection of the respondents, the time allowed to the Sole Arbitrator had expired. It is stated that the Apex Court in the case of ***S.B.P. & Co. V. Patel Engineering Ltd. and another [(2005) 8 SCC, page 618]***, the verdict given in *Konkan Railway Corporation Vs. Rani Corporation [(2002) 2 SCC, 3388]* was overruled and it was held that the nature of jurisdiction exercised under Section 11 of the said Act is judicial in nature and the Court is required to record its finding upon the maintainability of the Claims by the Arbitrator. In view of the case law ***S.B.P. & Co. [(2005) 8 SCC, Page 618] supra***, it has been submitted that this Court is bound to consider and adjudicate upon the maintainability of the claims by the Arbitrator as well as it was prayed that in view of the procedural irregularities on the part of the applicant, the time extension application moved under Section 11(5) and 11(6) is liable to be dismissed.

I have heard submissions made by the learned counsel for the rival parties and perused the material on record including the verdict of the Apex Court on the subject.

It was vehemently argued by the counsel for the respondents that the applicant has nowhere mentioned in the application as to whether the condition for exercise of power under Section 11 of the Arbitration and Conciliation Act, 1996 are satisfied or not. Therefore, the prayer sought for is not in accordance with law and hence the same deserves to be rejected. It was further submitted that the present application has to be

considered on touch stone of the law laid down by the Hon'ble Apex Court in S.B.P. Vs. Patel Engineering Ltd. [(2005) 8 S.C.C. Page 618.

On the other hand, it was submitted by the applicant's counsel that the argument of the learned counsel for the respondents is misconceived considering the fact that the application be decided in terms of the judgment of the Apex Court (supra) because the verdict of the Apex Court has prospective effect and not retrospective, as has been held in paragraph No. 47 (x) of the judgment which reads that ***“since all were guided by the decision of this Court is Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. and orders under Section 11(6) of the Act have been made based on the position adopted in that decision, we clarify that appointments of arbitrators or Arbitral Tribunals thus for made, are to be treated as valid, all objections being left to be decided under Section 16 of the Act. As and from this date, the position as adopted in this judgment will govern even pending applications under Section 11(6) of the act.”*** The submission of the learned counsel for the applicant has force.

It was further submitted by the learned counsel for the applicant that the Court has ample power to extend the time fixed by the court in its motion.

It has been further submitted by the learned counsel for the respondents that there is no provision in the Arbitration and Conciliation Act, 1996 to fix time to give arbitral award by the arbitrator. The argument of the learned counsel for the respondents is that the applicant has moved the present application under the provisions of Section 11(6) of the Act. This argument is misconceived on the face of it, because in view of the decision of Konkan Rly. Corporation Ltd. (supra), the arbitrator was given time to file award and till then, the order so made was administrative and not judicial until the verdict of the Apex Court as discussed earlier.

Moreover, the effect of the SBP & CO. Case (supra) is prospective and not retrospective.

It was lastly submitted by the learned counsel for the objectors that in view of the Apex Court Judgment in the case of SBP & CO. (supra), now before appointment of the Arbitrator, it has to be seen by the Court whether the matter is referable or not. According to the learned counsel, now the order passed by the Judge is an order judicial in nature and not administrative and before extending the time, this issue has to be decided by the Court. This submission is misconceived for the simple reason that at the moment, this issue has not to be decided the application being merely for extension of time. Mere mentioning the provision as under Section 11(6) of the Arbitration and Conciliation Act, the application cannot be treated to be for appointment of Arbitrator. The application has to be examined on the basis of its contents and the prayer made therein. It is not in dispute that the present application has been moved for extension of time and not for appointment of arbitrator, therefore, the contention of the learned counsel for the objectors is not acceptable.

In the case at hand, the time to give award was fixed by the Court in the interest of justice and to protect the interest of the parties so as to conclude the arbitration proceeding within the stipulated period.

It is well settled law that the parties should not suffer for the mistake committed by the Court in case time was fixed by the court under wrong impression and in such eventuality, the applicant should not suffer for such mistake. It may be mentioned here that if the Court has a power to fix the time in the interest of justice, the Court can also enlarge time by exercising its inherent powers.

It would not be out of place to mention that when the application for appointment of arbitrator was allowed, the decision

of the Apex Court in the case of Konkan Railway Corporation [(2002) 2 SCC, 388] was in force and the power being exercised by the Court was administrative in nature and from 26-10-2005 in view of the judgment in the case of S.B.P. & Company Vs. Patel Engineering Ltd. (supra), the power exercised by the Chief Justice of the High Court or the Judge designated in judicial in nature as indicated earlier also.

In the result, the application succeeds. The objections are disposed of accordingly.

The arbitrator is allowed six months' time to conclude the arbitral proceedings and to give his award from the date of production of certified copy of this order.

(B.S. Verma, J.)

RCP